Supreme Court, U.S.
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No. 00-131

In the Supreme Court of the United States

OCTOBER TERM, 2000

K.D.M., a minor, by and through his father and next friend, W.J.M.,

Petitioner,

v.

Reedsport School District and Stan Bunn, in his official capacity as Oregon Superintendent of Public Instruction,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should deny the petition when the record does not support a key assumption that underlies both the petition and the Court of Appeal's dissent—*viz.*, that, as a general matter, the State and local school districts provide special education services on site to students at private secular schools.

2. Whether the Court should deny the petition when, contrary to the view of petitioner and the dissent, the Ninth Circuit's opinion is narrow in scope and expressly limited by its facts to situations, such as the one presented here, in which petitioner has failed to demonstrate that any burden has been placed on his free exercise of religion, and when petitioner and the dissent also exaggerate the extent of the possible conflict between the circuits—a conflict that largely disappears when the facts of the cases are considered.

3. Whether the Court should deny the petition when the state Board of Education is in the process of repealing the portion of the administrative rule that petitioner challenges, and the case, therefore, will soon be moot.

TABLE OF CONTENTS

Page

Questions Presented i

Statement of the Case 1

Reasons Why the Petition Should Be Denied 2

I. Both petitioner and the Court of Appeal's dissent rely on the erroneous assumption that the State generally provides special education services on site at secular private schools 2

II. Petitioner and the Ninth Circuit dissent exaggerate both the sweep of the majority's opinion and the possible disagreement amongst the circuits 6

III. This case will soon be moot 11

Conclusion 15

Appendix A

Stipulated Facts App-1

Appendix B

Notice of Proposed Rulemaking Hearing App-7

Statement of Need and Fiscal Impact App-9

Proposed Administrative Rule App-11

TABLE OF AUTHORITIES

Page

Cases Cited

Agostini v. Felton, 521 U.S. 203 (1997) 14

Brown v. Borough of Mahaffey, Pa., 35 F.3d 846 (3d Cir. 1994) 8, 10

Church of Scientology v. United States, 506 U.S. 9 (1992) 12

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 10, 11

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 14

Department of Treasury v. Galioto, 477 U.S. 556 (1986) 13

Fla. Gen. Contractors v. Jacksonville, 508 U.S. 656 (1993) 14

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 13

Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995) 8, 9 10, 11

Kremens v. Bartley, 431 U.S. 119 (1977) 13

McDaniel v. Paty, 435 U.S. 618 (1978) 10, 11

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 13

Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998) 8, 9, 11

Princeton University v. Schmid, 455 U.S. 100 (1982) 12

Richmond v. Crosen Co., 488 U.S. 469 (1989) 13

Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 329 (1999) 8

Statutory Provisions

42 U.S.C. § 1983 13

Administrative Provisions

OAR 581-015-0166(2) 4
OAR 581-015-0166(3) 12

STATEMENT OF THE CASE

As explained below in the discussion of the first reason why this petition should be denied, a key assertion made in petitioner's statement of the case—*viz.*, that the Reedsport School District's (District's) practice and policy is to provide on-site special education services to students at private secular schools, while denying those services to children at religious schools—is not supported by the record or the applicable law. In addition, petitioner's statement of the case is argumentative. The following statement of the facts is taken from the majority opinion in the Ninth Circuit, which in turn is based on the stipulated facts.

> While attending public school, KDM received from the District the services of a vision specialist, physical therapy and special equipment at his school. Motivated by sincerely-held religious beliefs, KDM's parents transferred him to Harbor Baptist Church School ("Harbor Baptist"), a sectarian school. After the transfer, the District continued to supply him with special equipment (braillers, computers and other special equipment) at his new school. However, viewing the Harbor School setting as not religiously-neutral, it no longer supplied the vision specialist at the school. Instead, it provided that service at a fire hall down the street from Harbor Baptist. The adequacy of the service is not in dispute nor is it disputed that it is safe for KDM to travel to and from the fire hall, transportation being provided by the District.[1] The service is provided for approximately ninety minutes twice a week. If this service were provided at Harbor Baptist, it

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[1] Petitioner's contention that KDM is forced to "take a painful walk out of his religious school * * * to travel several blocks to a fire hall" is not supported by the record or the stipulated facts. (Pet 13).

> would be provided in a room separate from the classroom because providing it in class could be disruptive to the instruction both of KDM and the other students in the classroom.

(Pet, App B, 6a–7a). Thus, even if Harbor Baptist were a private, non-religious school, and even if the District chose to provide services at the private school, the services nevertheless would be provided outside KDM's regular classroom, just as they are now.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Both petitioner and the Court of Appeal's dissent rely on the erroneous assumption that the State generally provides special education services on site at secular private schools.

Both petitioner and the Ninth Circuit dissenters insist that the State and the District generally provide special education services on site at non-religious private schools. Petitioner asserts that the District's practice and policy "is to provide on-site special education services to children with disabilities attending public schools and *non-religious* private schools, but withhold such services from children with disabilities attending *religious* schools." (Pet 5; emphasis in original). Petitioner also contends that the receipt of "on-site special education services" is "a benefit generally available to a disabled student under Oregon law[.]" (Pet 20). In arguing why the questions presented are of national importance, petitioner again asserts that the benefits at issue here "would be available [under Oregon law] on-site to a child in a non-religious private school." (Pet 21).

The Court of Appeal's dissent in based on the same assumption as the one made by petitioner. The dissent emphatically insists that Oregon has "decided to provide [special edu-

cation] services in private schools" and that, in Oregon, "[h]andicapped children at secular private schools get special education in their schools[.]" (Pet, App B, 16a, 17a). The dissent also contends that "[u]nder Oregon's regulation, if a blind child with cerebral palsy goes to a secular private school, he gets special education in his school," and that the state provides special education services "generally to all children in their public or private schools." (Pet, App B, 20a, 22a).

However, petitioner's and the dissent's repeated assertion that the District specifically and school districts in the State generally provide special education services on site at private non-sectarian schools is not supported by the record in this case or by the applicable law. As a factual matter, the record does not support petitioner's and the dissent's claim that the practice and policy of the District specifically or of Oregon school districts generally is to provide on-site special education services at private non-religious schools.[2] Instead, as the Ninth Circuit majority found, "[t]he record does not disclose whether Reedsport or other school districts provide services at nonsectarian private schools," although admittedly the rule "does not preclude them from doing so." (Pet, App B, 7a n 2). Petitioner does not dispute that finding.

Moreover, it is not reasonable to assume that, absent the "religiously-neutral setting" requirement, school districts generally would provide special education services on site at pri-

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[2] In support of the assertion, petitioner cites only the District Court's order observing that the state administrative rule "has the effect of *allowing* in-class services to disabled students at non-religious schools while prohibiting in-class services to disabled students at religious schools, both public and private." (Pet, App C, 33a; emphasis added). Although the rule may *allow* the provision of on-site services at secular private schools, the record does not demonstrate that such services are in fact provided on site at any such school.

vate schools. A number of factors might enter into a school district's discretionary choice of whether to provide services on site, such as: cost, the number of students involved, the number of private schools involved, the distance between them, proximity to a public school, whether the services could be provided in a group setting or are necessarily one-on-one in nature, and the facilities available at a particular private school. An evaluation of those factors would not necessarily lead a school district to decide to provide on-site services. Thus, as a matter of fact, petitioner's and the dissent's assertion that special education services generally are provided on site at private, non-religious schools is not supported.

As a legal matter, the provision of on-site services also is not required. Under a portion of the Board's rule that is not challenged in this case, a disabled child does not have a right to be provided with on-site services at *any* private school. That portion of the rule provides that if a child with a disability "is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in a private school," the child has no "individual entitlement to receive special education and related services from the child's resident school district." OAR 581-015-0166(2) (Pet, App F, 53a). Instead, the question of whether services should be provided at all, and if so, how and where, is left to the school district's sole discretion: in such situations, the district "shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, *including the location for the delivery of those services*." OAR 581-015-0166(2) (Pet, App F, 53a; emphasis added).[3]

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[3] Petitioner argued below that he had a statutory right to the provision of on-site services, but both the District Court and the Ninth Circuit rejected his statutory claim, which he does not renew in his petition.

Because the unchallenged portion of the state administrative rule makes it clear that no child has a right to on-site services at any private school, when the District Court upheld petitioner's constitutional challenges to the disputed "religiously-neutral setting" provision, the court nevertheless did not order that KDM or any other student was entitled to on-site services at a private school. Instead, the court simply ordered that the District could not rely on the "religiously neutral" requirement to deny on-site services. The District retained discretion as to whether to provide such services at all, and, if so, how and where to provide them. In sum, striking down the "religiously-neutral setting" provision does not entitle any child to on-site services at a private school or lead inexorably to the conclusion that such services will be provided on site.

Admittedly, under the disputed portion of the state rule, special education benefits are not available on site except in a religiously-neutral setting. However, it does not follow and, as noted, the record does not establish that benefits therefore are available and provided on site at private, non-sectarian schools. On the contrary, the unchallenged portion of the rule clearly states that no child at any private school has the right to receive benefits at all, and that whether and, if so, how and where such benefits are provided, is instead a matter entrusted to the discretion of the individual school district. Thus, petitioner's argument, and the difference in treatment of which petitioner complains, are based on an incorrect assumption: *viz.*, that students in private non-sectarian schools receive on-site services, while those in religious schools do not. Because that assumption, which is reiterated throughout the Ninth Circuit dissent and the petition, appears to underlie much of the dissent's and the petitioner's analysis, and the assumption is at odds with the text of the unchallenged portion of the state's

rule and is not supported by the record, this court should deny the petition.

II. Petitioner and the Ninth Circuit dissent exaggerate both the sweep of the majority's opinion and the possible disagreement amongst the circuits.

Petitioner, and the dissent in the Ninth Circuit, seek to portray the majority's decision as one sweeping in its scope. Both petitioner and the dissent also suggest that the circuits are split and that this Court, therefore, should grant the petition.[4] Both of those claims are exaggerated.

First, the Ninth Circuit majority stressed that its decision was based on, and limited to, the facts of this case. The majority emphasized that:

> *The narrow question before us* is whether the free exercise rights of KDM and his parents were impermissibly burdened by the application of Oregon's regulation, which precludes the District from providing special education services to KDM at the sectarian school he attended. In deciding that question *we are guided by the distinction the Supreme Court has recognized in the Establishment Clause context between a statute's invalidity on its face and its invalidity in particular applications. See Bowen v. Kendrik,* 487 U.S. 589, 602 (1988); *see also Hunt v. McNair*, 413 U.S. 734, 742 (1973) (examining only "the transaction presently before [the court]" and not the statute as a whole"); *Zobrest v. Catalina Foothills Sch. Dist.*, 963 F.2d 1190, 1194 n. 3 (9th Cir. 1992) (considering

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[4] Petitioner asserts that "the failure of lower courts to reach consistent conclusions regarding the constitutionality of structurally similar educational benefit programs impedes parents' free exercise of their religious education choices for their children[.]" (Pet 21).

> "only the validity of one very specific proposed application of the statutes at issue"); *rev'd on other grounds,* 509 U.S. 1 (1993). *Whatever the impact of the [Oregon] regulation might be in other factually distinct situations, cf. Zobrest,* 963 F.2d at 1192 (failure to provide a sign-language interpreter in the classroom for plaintiff effectively forced his parents to choose between foregoing a sectarian education or paying for the cost of the interpreter themselves) and *Peter v. Wedl,* 155 F.3d 992 (8th Cir. 1998) (failure to provide a spastic quadriplegic student with needed fulltime paraprofessional while in school forced choice between forgoing sectarian education or paying for the paraprofessional), *this is not a case in which the regulation impinges on plaintiffs' free exercise rights.*

(Pet, App B, 9a–10a; emphasis added).

Having stressed that it was dealing with an as-applied challenge and that its decision, therefore, was limited to the facts of this case, the majority then turned to those facts.

> The parties stipulated that the service provided to KDM at the fire hall down the street from the school twice a week for ninety minutes is in compliance with KDM's statutory individualized education plan, the adequacy of which is not in dispute, and that he could safely travel there—indeed, the vision specialist comes to KDM's school, picks him up and them returns him to his school. Moreover, plaintiffs have stipulated that the vision specialist's services would not be provided in-class at Harbor Baptist but in a separate room. Thus, there is no support for the district court's finding that the regulation forces KDM and his parents to choose between enrolling at Harbor Baptist

> and receiving special education at the fire hall or enrolling at a nonreligious school and receiving in-class services. In sum, there is no showing that application of the regulation to KDM's case burdens KDM's or his parents' free exercise of their religion.

(Pet, App B, 10a). Thus, the majority held only that, in this case where no burden was shown, petitioner had not sustained his free exercise claim. That conclusion was derived from the facts of this case, which include: petitioner's agreement that KDM's individualized education plan is adequate, that traveling to the fire hall is safe, and that, even if the vision specialist's services were provided at Harbor Baptist, they would not be provided in KDM's regular classroom, but instead in a separate room. The majority's decision is not a broad or sweeping one, but is instead fact-bound, case-specific, and limited.

As noted, petitioner and the dissent in the Ninth Circuit also suggest that the circuits have reached disparate results and have failed "to reach consistent conclusions regarding the constitutionality of structurally similar educational benefit programs[.]" (Pet 21). For that proposition, petitioner and the dissent cite *Strout v. Albanese,* 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 329 (1999), as being consistent with *KDM*, and decisions from the Third, Sixth and Eighth Circuits as being inconsistent with the Ninth Circuit's decision in this case. *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846 (3d Cir. 1994); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

An examination of those decisions, admittedly, may reveal some analytical tension between them. *Compare, e.g., Strout*, 178 F.3d at 63 (holding, in a case involving a challenge to a state statute providing that the state will pay for some private school education "provided the institutions are

'non-sectarian' in nature," that the question is "whether government has placed a substantial burden on the observation of a central [religious] belief or practice;" internal quotation marks and emphasis omitted); with *Hartmann*, 68 F.3d at 979 n. 3 ("substantial burden" test is "designed to judge [only] those situations in which a neutral and generally applicable regulation imposes an indirect, albeit substantial, burden on the practice of religion"). On closer examination, however, the differing results and the apparent analytical tension appear to be largely a result of radically differing fact patterns. Certainly nothing in the Ninth Circuit's opinion suggests that the results in these cases would be different were the cases analyzed under the framework the court utilized in this case.

In *Peter v. Wedl*—the case on which petitioner principally relies for his claim that there is a circuit conflict (Pet 11-13)—the state school district refused to provide the services of a full-time paraprofessional to a "severely disabled child" at the child's religious school even though the child required such assistance in order to be able "to function in a school classroom." 155 F.3d at 994. The school district's refusal was based on a state statute allowing the provision of special education services only at a "neutral site," which was defined to include "a nonsectarian private school." *Id.*

In contrast to this case, where the burden imposed by the state's rule is at most *de minimis*, the burden imposed in *Peter* was substantial. The full-time paraprofessional cost about $10,000 per year and, ultimately, the child's parents were forced to choose between placing their son at a sectarian school and providing him with the assistance he needed to attend school at all. *Id.* at 994. Moreover, the record demonstrated that the district in fact provided assistance to students at nonsectarian private schools—a showing not made in this case. *Id.* at 997

Hartmann v. Stone dealt with an Army regulation prohibiting on-base day-care providers "from having any religious practices, such as saying grace or reading Bible stories, during their day-care program." 68 F.3d at 975. One of the plaintiffs had been a day-care provider under the Army program "until she discovered Army regulations prohibited her from providing any religious activities for her children or those children whose parents had requested such activities." *Id.* The other plaintiffs were active duty Army personnel or their spouses who had been forced to choose between obedience to the Army regulations and selecting the child care they wanted. Again, in contrast to the at most *de minimis* burden shown here, the burden in *Hartmann* was substantial, and the Army in fact treated day-care providers who included some religious practices differently from those who did not.

Brown v. Borough of Mahaffey, Pa., also is strikingly dissimilar to this case. There, in the midst of a situation marked by extreme animosity toward the plaintiff, a Pentecostal minister conducting revival meetings, the borough repeatedly locked a gate giving access to the site where the revival meetings were to be held. 35 F.3d at 848–49. Both the impact and the religious animus shown in that case are unlike anything disclosed in this record, where the Ninth Circuit majority noted that "the District's solicitousness in accommodating KDM could hardly be said to reflect a purpose to 'suppress[] religion or religious conduct.'" (Pet, App B, 11a).

Similarly, both *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *McDaniel v. Paty*, 435 U.S. 618 (1978)—both relied on by petitioner and said to be contrary to the Ninth Circuit's decision in this case—involve notably different facts. In *Lukumi*, regulations that were ostensibly facially neutral were in fact "targeted" against a central religious practice of the Santeria religion—animal sacrifice. This Court held that "[t]he Free Exercise Clause pro-

tects against governmental hostility which is masked as well as overt." 508 U.S. at 534. In *McDaniel v. Paty*, state law forbade a minister from serving as a delegate to the state's limited constitutional convention. 435 U.S. at 620. The minister was forced to choose between his vocation and his desire to exercise his political rights "because the State ha[d] conditioned the exercise of one on the surrender of the other." *Id.* at 626.

In sum, in *Lukumi* and in *McDaniel*, as in the circuit court cases on which petitioner relies, substantial burdens were imposed by the challenged laws. Therefore, the suggestions in some of those circuit court cases that the substantial burden test does not or should not apply are mere *dicta*. *See, e.g., Hartmann*, 68 F.3d at 979 n. 3. But most importantly, nothing in the Ninth Circuit opinion suggests that those cases would come out differently under the majority's analysis in this case. Thus, when viewed in the light of their facts, the cases petitioner cites are readily reconcilable. In those cases where a substantial burden was created, a free exercise violation was found. *See Peter v. Wedl; Hartmann; Brown.* In contrast, in this case no burden, other than perhaps a *de minimis* one, is present. Petitioner has pointed to no case, and the state is aware of none, where no burden, or at most a *de minimis* one, has been held to amount to a free exercise violation. Simply put, the circuit conflict petitioner identifies is more apparent than real. Because the Ninth Circuit's decision is carefully and explicitly limited to its facts, and because the cases can be reconciled in light of the facts on which they appear to depend, this Court should deny the petition.

III. This case will soon be moot.

As noted in the questions presented, the state Board is in the process of repealing the portion of its administrative rule that is at issue here. Petitioner's attack is aimed at the subsec-

tion of the rule that states that special education and related services "shall be provided in a religiously-neutral setting." OAR 581-015-0166(3) (Pet, App F, 53a). The state Board intends to repeal that portion of the rule. Appended to this brief is the proposed rule amendment, which would delete that portion of the rule. (App B, App-11). A hearing on the proposed rule amendment is scheduled for October 24, 2000. (App B, App-7). The Board next meets on December 7, 2000, and the rule amendment should become final and effective soon after that meeting.

In light of the impending rule repeal, this case is on the verge of becoming moot. The repeal of the provision that is at issue here would moot this case.

> It has long been settled that a federal court has no authority "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895). *See also Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party, the appeal must be dismissed. *Mills*, 159 U.S. at 653.

Church of Scientology v. United States, 506 U.S. 9, 12 (1992). For that reason, this Court should deny the petition. The issues presented soon will be hypothetical, and the Court "does not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before" the Court. *Princeton University v. Schmid*, 455 U.S. 100, 102 (1982) (citations omitted).

Moreover, the state Board will have little incentive to defend a rule that it no longer believes is necessary or desirable.

> Constitutional adjudication being a matter of "great gravity and delicacy," *see Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring), we base our refusal to pass on the merits on "the policy rules often invoked by this Court 'to avoid passing prematurely on constitutional questions. * * *'"

Kremens v. Bartley, 431 U.S. 119, 128 (1977), quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 756 n 8 (1976). Because, with the amendment of the rule, no actual, live controversy will be presented here, this Court should avoid passing prematurely on the constitutional questions presented. *Kremens*, 431 U.S. at 129 (passage of new statute "clearly moots" claims presented). *See also Department of Treasury v. Galioto*, 477 U.S. 556, 559–60 (1986) (same).[5]

Admittedly, in some rare cases this Court has considered the validity of legal provisions despite their subsequent repeal, invoking "the 'well-settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Fla. Gen. Contractors v. Jacksonville*, 508 U.S.

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[5] Although claims about the validity of a statute or rule can be mooted by the enactment of new provisions, a case nevertheless may not be moot if a claim for damages is presented. *See Richmond v. Crosen Co.*, 488 U.S. 469, 478 n 1 (1989) (so holding); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8 (1978) (same). That exception does not apply here. In his complaint, petitioner sought an award of damages, but that request was based solely on his claim brought under 42 U.S.C. § 1983. The District Court ruled against that claim "[b]ecause there [was] no evidence that [the superintendent] intentionally or recklessly violated plaintiff's clearly established constitutional rights," (Pet, App C, 34a), and petitioner has never renewed the claim or challenged the District Court's ruling. Aside from that claim for damages, petitioner has sought only prospective relief.

656, 662 (1993), quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). In those cases, the Court has observed that "the defendant's 'repeal of the objectionable language would not preclude it from re-enacting precisely the same provision if the District Court's judgment were vacated.'" *Id.* The Court appears to have considered the validity of subsequently repealed laws, however, only when it had some reason, grounded in the record, to suspect that the "objectionable language" would be reenacted if the case were dismissed. In *City of Mesquite*, for example, the city "ha[d] announced just such an intention." 455 U.S. at 289.

Here, in contrast, the State has asserted that it intends to repeal the disputed rule and not to enact any similar provision in its place. The state Board's "statement of need" for the proposed rule amendment explains that, although the rule "was adopted in the belief that the state and federal law required this provision," "[r]ecent legal opinions have called this position into question" and the current understanding "is that this provision is no longer constitutionally required." (App B, App-9). *See, e.g., Agostini v. Felton*, 521 U.S. 203 (1997) (placing public school teachers in parochial schools does not violate the First Amendment). Absent a constitutional mandate for the rule, the Board "does not believe that other policy reasons support the continuation of this rule[.]" (App B, App-9). This Court has no reason to suspect or to disregard the State's good faith assertion that it intends to repeal the portion of the rule in dispute and not to enact any similar provision in its place.

In sum, because of the imminent repeal of the rule provision challenged here, this case will soon be moot. Therefore, this Court should deny the petition.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

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October 12, 2000

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

K.D.M., A Minor, by and Through His Father and Next Friend, W.J.M., Plaintiff, v. REEDSPORT SCHOOL DISTRICT and NORMA PAULUS, in Her Official Capacity as Oregon Superintendent of Public Instruction, Defendants.	Civil No. 96-6075-HO STIPULATED FACTS

The parties stipulate that, for purposes of this action, the following statements are true:

1. Plaintiff resides at 563 Elm Avenue in the city of Reedsport, County of Douglas, State of Oregon. Plaintiff's child resides with the Plaintiff at the same address.

2. Defendant Reedsport School District ("District"), a political subdivision of the State of Oregon, is a public school district that receives federal assistance under 20 U.S.C. §§ 1400, *et seq.* The District's principal place of business is at 100 Ranch Road in the City of Reedsport, County of Douglas, State of Oregon.

3. Defendant Norma Paulus is Oregon's Superintendent of Public Instruction ("Superintendent"). Her principal place of

business is at 255 Capitol Street, N.E., in the City of Salem, County of Marion, State of Oregon.

4. Plaintiff's child is legally blind and has cerebral palsy. As such he falls within the meaning of the term "children with disabilities" as defined in the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401(a).

5. Plaintiff's child is entitled to receive assistance from the State of Oregon on the basis of his disability under the IDEA, and has received such assistance by means of a vision specialist, physical therapy, and other special equipment. He has received such assistance through the District by way of contractual relationships with the Coos Education Service District since he was approximately one year of age. He received such services at Highland Elementary School, a public school he attended prior to attending Harbor Baptist Church School.

6. The District has not provided a vision specialist to Plaintiff's child in his classroom since he began attending the Harbor Baptist Church School in Winchester Bay, Oregon, in 1993, because the Harbor Baptist Church School is a sectarian religious school. Prior to attending Harbor Baptist Church School, K.D.M. received such assistance in his school.

7. The District has continued to supply Plaintiff's child with a vision specialist and those services have been provided at the fire hall in Winchester Bay, Oregon, down the street from the Harbor Baptist Church School, and the District has continued to supply him with braillers, computers, and other special equipment at his school. Plaintiff's child received assistance at the fire hall for approximately 90 minutes, twice per week. These services by the District are in compliance

with the individualized education plan for Plaintiff's child, the adequacy of which is not in dispute. It is safe for plaintiff's child to travel to and from the fire hall with the supervision currently provided.

8. Plaintiff and his wife enrolled this child in the Harbor Baptist Church School based upon sincerely-held religious conviction and beliefs.

9. The vision specialist could provide services to Plaintiff's child in his regular classes, but such an arrangement could prove disruptive to the instruction of Plaintiff's child and the other students in the classroom. Plaintiff would agree to the provision of services in a separate room at Harbor Baptist Church School.

10. The State of Oregon interprets Article I, § 5, of its constitution to require the provision of special education and related services in a religiously-neutral setting.

11. On May 25, 1995, the State Board of Education filed a new rule with the Secretary of State, OAR 581-15-166, which states:

> "Public Educational Agency Responsibility for Children Placed by Parents in Private Schools
>
> (1) If a child with a disability, who is three through the age of eligibility for kindergarten, is offered a free and appropriate public education by the Department of Education and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the Department of Education. Consistent with the procedures set forth in OAR 581-15-171, the Department of Education shall

determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for delivery of those services.

(2) If a child with a disability, who is at the age of eligibility for kindergarten through age 21, is offered a free appropriate public education by the child's resident school district and the parent of the child unilaterally enrolls the child in a private school, the child shall not have an individual entitlement to receive special education and related services from the child's resident school district. Consistent with the procedures set forth in OAR 581-15-171, resident school districts shall determine which children with disabilities shall receive services, what services shall be provided and how those services shall be provided, including the location for the delivery of those services.

(3) Such special education and related services shall be provided in a religiously-neutral setting.

(4) The Department of Education and school districts shall provide such children with genuine opportunities for equitable participation in special education consistent with the number of children and their needs."

12. The District is not providing the services of a vision specialist to plaintiff's child at the Harbor Baptist Church School because the School District and the State of Oregon believe the setting is not religiously-neutral.

13. Pursuant to with [*sic*] 20 U.S.C. § 1415(b) and ORS § 343.165, the Superintendent appointed a Hearing Officer to determine whether Reedsport must provide a vision specialist for plaintiff's child in his classroom. A copy of the Hearing

Officer's Order, which became final and was mailed to the plaintiff and District November 20, 1995, is attached at [*sic*] Exhibit 1.[1]

/s Gregory A. Chaimov
Assistant Attorney General
Of Attorneys for Defendant
State of Oregon

Date: 28 July 97

not /s David C. Gibbs, Jr.

Date: [not dated]

/s Joseph D. Robertson
Of Attorneys for Defendant
Reedsport School District

Date: July 28, 1997

/s Harold B. Scoggins, III,
OSB #91421
Of Attorneys for Plaintiff

Date: 8-8-97

[1] The Hearing Officer's Order is printed as Appendix D of the Petition for Writ of Certiorari.

APPENDIX B

Secretary of State

NOTICE OF PROPOSED RULEMAKING HEARDING*

A Statement of Need and Fiscal Impact accompanies this form

BOARD OF EDUCATION — 581
Agency and Division — Administrative Rules Chapter Number

Rona Hodges — (503) 373-0840 ext. 467
Rules Coordinator

255 Capitol St NE, Salem, OR 97310-0203
Address

10/24/00	3:00–5:00	PSB 2nd Floor, Rm. 251A	Michael V. Reed
Hearing Date	Time	Location	Hearings Officer

Are auxiliary aids for persons with disabilities available upon advance request? Yes No

RULEMAKING ACTION

ADOPT:
Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

AMEND:
581-015-0166

REPEAL:

Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

Amend and Renumber: Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

ORS 343.041, 343.055
Statute Authority: ORS

34 CFR 300.450 to 462, and specifically 34 CFR 300.456
Other Authority

ORS 343.155
Statutes Implemented: ORS

RULE SUMMARY

Public Agency Responsibility for Private School Children with Disabilities and Limitation on Services

For questions regarding this rule please contact Suzy Harris at (503) 378-3573. For a copy of this rule please contact Rona Hodges at the same number or by e-mail: rona.hodges@state.or.us

October 24, 2000	/s C. Gregory McMurdo 9/14/2000
Last Day for Public Comment	Authorized Signer and Date

The *Oregon Bulletin* is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE Salem, Oregon 97310 by 5:00 pm on the 15th of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday.

ARC920-1997

Secretary of State

STATEMENT OF NEED AND FISCAL IMPACT

A Notice of Proposed Rulemaking Hearing or a Notice of Proposed Rulemaking accompanies this form.

BOARD OF EDUCATION — 58100

Agency and Division — Administrative Rules Chapter Number

In the Matter of the Amendment of OAR 581-015-0166, Public Agency Responsibility for Private School Children with Disabilities and Limitation on Services	))))))	Statutory Authority, Statutes Implemented, Statement of Need, Principal Documents Relied Upon Statement of Fiscal Impact

Statutory Authority: ORS 343.041, 343.055

Other Authority: 34 CFR 300.450 to 462, and specifically 34 CFR 300.456

Statutes Implemented: ORS 343.155

Need for the Rule(s): The former subsection (3) was adopted in the belief that the state and federal law required this provision. Recent legal opinions have called this position into question, and the current legal thinking is that this provision is no longer constitutionally required. The Department does not believe that other policy reasons support the continuation of this rule absent a constitutional mandate. In KDM vs. Reedsport, the Ninth Circuit did not find that the rule unconstitutional based on the specific fact situation in that case. Given the Ninth Circuit's opinion in the Reedsport case, the former subsection (3) is likely to invite continued litigation to clarify the factual parameters of what exactly constitutes an undue burden on the free exercise of religion. This rule change would eliminate the costs of this potential litigation.

Documents Relied Upon: Federal regulations and commentary, KDM vs. Reedsport, Case No. 98-35186 (9th Cir. 2000)

Fiscal and Economic Impact: Unknown

Administrative Rule Advisory Committee consulted? ☐ Yes ☒ No
If "No", why not? The State Board of Education acts as the Administrative Rule Advisory Committee for the Department of Education.

/s C. Gregory McMurdo
C. Gregory McMurdo, Executive Legal Officer

ODE template based on ARC925-1997

Public Agency Responsibility for Private School Children with Disabilities and Limitation on Services

581-015-0166(1) No private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

(2) Decisions about the services that will be provided to private school children with disabilities must be made in accordance with OAR 581-015-0171 and –0151.

[*(3) Such special education and related services shall be provided in a religiously-neutral setting.*]

(3) [*(4)*] The services provided to private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public schools or ECSE program.

(4) [*(5)*] (Private school children with disabilities may receive a different amount of services than children with disabilities in public schools.

(5) [*(6)*] No private school child with a disability is entitled to any service or to any amount of a service the child would receive if enrolled in a public school.

(6) [*(7)*] Public agencies are not required to develop an IEP or IFSP that assumes a public agency placement for each private school child each year.

(7) [*(8)*] If a parent of a private school child with a disability requests an IEP or IFSP meeting, the public agency shall either:

(a) hold an IEP meeting within a reasonable time; or

(b) provide the parent with prior written notice of the public agency's refusal to hold an IEP or IFSP meeting.

Stat. Auth.: ORS 343.041, ORS 343.055 & CFR § 76.650

Stats. Implemented: ORS 343.155

Hist.: 1EB 28-1978, f. & ef. 7-20-78; 1EB 25-1980, f. & ef. 11-7-80; EB 12-1995, f. & cert. ef. 8-25-95; ODE 16-2000, f. & cert. ef. 5-23-00

rh admin/hodges/oars/working document oars/581-015-0166
as drafted 9/14/00